United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 76-4280

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, A DIVISION OF RWDSU, AFL-CIO,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JAY E. SHANKLIN,
ANDREW F. TRANOVICH,

Attorneys,

National Labor Relations Board.
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

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UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, A DIVISION OF RWDSU, AFL-CIO, RESPONDENT.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Union violated Sections 8(b)(1)(A) and 8(b)(2) by threatening to cause and thereafter causing the discharge of Verneal Salters under the union security clause for reasons other than her failure to pay Union dues.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.) for enforcement of its order issued against District 1199, National Union of Hospital and Health Care Employees, a Division of RWDSU, AFL-CIO ("the Union") on June 24, 1976. The Board's Decision and Order are reported

at 225 NLRB No. 23 (A. 2-23).[1/] This Court has jurisdiction of this proceeding, the unfair labor practice having occurred in New York, New York.

I. THE BOARD'S FINDING OF FACT

A. Salters promises to satisfy her Union dues arrearage on May 30.

Since at least 1969, Upper Manhattan Medical Group ("the employer") has recognized the Union as the collective bargaining representative of a unit of its employees and has executed contracts requiring employees to join and maintain membership in the Union to retain their employment (A. 3).

Verneal Salters, a licensed practical nurse employed by the employer since September 1969, was erratic in paying her Union dues.[2/] Although she was a member of the Union's contract negotiating committee from November 1974 to April 1975, she had last paid up her dues through April 1974. At the negotiating sessions, Union Vice President Edward Bragg, who was also a member of the negotiating committee, urged Salters to make dues payments (A. 6; 168-169).

On May 5, 1975,[3/] at the contract ratification meeting of employees, Bragg spoke to Salters and other employees in attendance about

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1/ "A." references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2/ For example, in May 1971 she made a payment to the Union for dues owing since March 1970 (A. 4; 27,28). Then in February 1972, she made a dues payment to satisfy a seven month arrearage in dues (A. 4; 26-27). On April 29, 1974, she again paid her union dues for a period extending from August 1972 through April 1974 (A. 4; 24-25). From April 29, 1974 until May 28, 1975, the date of her discharge, she made no dues payment (A. (4; 68, 133).

3/ All dates are in 1975 unless otherwise indicated.

their delinquencies in paying dues (A. 4, 6-7; 72-73, 172-173). He warned Salters that he would send a letter to the employer asking for her discharge if she did not make arrangements to pay her one-year dues arrearage (A. 4; 73-74). Salters replied that she would pay her union dues in full before noon on Friday, May 30. She explained that she was a member of a vacation club, and that the funds from that club would be distributed to members on May 30. (A. 4; 73, 98-99).[4/] Bragg then told her: "Salters, if you don't have your money in by then, we're going to send in a letter." (A. 4; 74). Immediately after this conversation, Salters spoke to Eileen Wells, the custodian of the vacation club funds, to verify the fact that she would receive her share of the club funds on May 30 (A. 73).

B. The Union threatens to terminate Salters for failing to pay union dues after she questions the Union about retroactive wage payments.

At the May 5 contract ratification meeting, Bragg explained to the employees that as a result of the negotiations, they would receive retroactive pay raises in two separate checks during the month of May (A. 4; 76-77). On May 16, Salters received a check for retroactive pay in the amount of $26.00 (A. 4; 77). On May 23, she received the second check but realized that neither check included the overtime differential promised to the employees by Bragg on May 5 (A. 4; 77). She then went to see Zenia Walker, the bookkeeper for the employer and also

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4/ The Union's records indicated that as of May 31, 1975, Salters owed $125.50 in union dues (A. 58, 84). On May 29, 1975, Salters received $125.00 from the vacation fund (A. 101-104, 111-112, 214-215).

a member of the Union. Salters asked Walker why she had not received a full retroactive wage payment in the second check (A. 4; 77). Walker replied: "Salters, you are always starting trouble" (A. 4; 77). Salters then said: "What do you mean, I'm always starting trouble? I'm down here questioning my paycheck. We have an agreement that this is how the moneys are supposed to be paid, and this is not how the money is being paid" (A. 4; 77). Walker then replied: "The lady said to pay it all in three paychecks, and that is what I am doing" (A. 4;77).

Unsatisfied with this explanation, Salters then telephoned Bragg and asked if he could recall the manner of retroactive payments which had been agreed upon at the negotiations (A. 4, 7; 78, 181). Salters said that she thought the employees were supposed to be paid in full in only two pay checks (A. 5, 7-8; 78, 181). Bragg said that he could not remember (A. 5, 7-8; 78; 181-182). At that point Bragg received word that Cecilya King, the administrator for the employer was calling him (A. 5, 8; 78, 182). King told Bragg that Salters was "carrying on and complaining about not getting her retro money." (A. 8; 182). Bragg then asked to speak to the Union delegates. They told him that they "met with management and it was not management's fault, but it was Zenia Walker's fault and she is new and we have tried to explain that to Mrs. Salters, but Mrs. Salters did not want to hear anything" (A. 8; 183).

Bragg then called Salters back and told her: "Salters, you're always starting trouble. Why don't you just pay your dues and not cause cause trouble?" (A. 5; 78). Salters replied, "Hey, this is not about dues,

this is about backpay. I told you I would be down on the 30th of May to pay you" (A. 5; 78-79). Bragg answered: "You got a backpay for $26 and you didn't make any arrangements to come down and pay it." (A. 5; 79). Salters then replied: "Because I told you I'd be down and pay you on the 30th" (A. 5;79). Bragg then told her: "Listen, just pay your dues or I'll send a letter" (A. 5;79). At that point Salters became very angry and told Bragg: "You send a letter. You send a fucker" (A. 5; 79). She then hung up on Bragg and when he called her back, she hung up on him again (A. 5; 79).

C. The Union causes the termination of Salters on May 28

That same day Bragg initiated the internal Union process which eventually led to the discharge of Salters. Bragg filled out a Union form entitled "Request For Termination Letter To Employer" regarding Salters in which he stated that he contacted her on May 27, 1975 [sic] and numerous other times to pay her dues and that her only response was that "when she got the money she would pay" (A. 12; 58). Although the form stated that Salters owed $125.50 in union dues, no mention was made of the fact that she promised twice to pay her dues in full before noon on May 30 (A. 12-13; 58). This form was then approved by Bragg's superior, Phillip Kamenkowitz, the executive vice president of the Drug Division of the Union (A. 12; 58, 124-125, 184). After determining that Salters was delinquent in paying her dues, the Union's Financial Department mailed a letter to the employer on May 27 requesting

Salters' discharge (A. 12; 58, 129). About noon on May 28, Salters was discharged by the employer for failure to pay union dues (A. 5; 35, 79-81, 107-108).

D. The Union refuses to accept Salters' full dues payment on May 30.

After being discharged, Salters went home and telephoned Union Executive Vice-President Kamenkowitz (A. 5; 81). She told him that she made an agreement with Bragg to pay her dues on May 30, and that because of a difference of opinion between themselves, Bragg caused her discharge (A. 5; 81). Kamenkowitz replied: "I don't know anything about it and I don't think we want you back in the union anymore" (A. 5; 81). Salters then said: "Why is this? Is this something personal towards Miss Salters, or is Miss Salters the only one behind in her dues that this is being done? [sic] (A. 5; 81). She then asked Kamenkowitz to contact Bragg about rescinding the discharge (A. 5; 82). Although Kamenkowitz promised to call her back, he never did so (A. 5; 82).

The next day, May 29, Bragg called Salters and asked if she wanted to speak to him (A. 5; 82). She said that she was waiting for Kamenkowitz to call (A. 5; 82). Bragg then told her that Kamenkowitz had said that she wanted to speak to him (A. 5; 82). Salters then told him that she was going to come to the Union office and pay her union dues (A.5; 82-83). Bragg then said: "Well, the union doesn't want you back in here anymore, and we're not going to take your money." (A. 5; 82).

When Salters persisted that she was going to make her dues payment, Bragg replied: "Salters, as long as you are a practical nurse and if you ever become a registered nurse, you'll never work again in New York City. . . . as long as you owe union money, you'll never work" (A. 5; 83). Salters replied: "Make up your mind. Do you want my money or don't you want my money?" (A. 5; 83). Bragg replied: "Miss Salters, go to hell," and hung up (A. 5; 83).

On May 30, after having received $125.00 from the vacation club on May 29, Salters went to the Union office before noon and told the clerk that she wanted to pay her union dues (A. 6; 83). The clerk, when checking Salters' dues record, noticed that a form signed by Bragg was attached indicating that Salters' union dues should not be accepted (A. 6, 8; 83,186-187). The clerk then called Bragg, who appeared in the finance office a short time later (A. 6, 8, 84). Bragg then said: "I am just a mere figurehead. I have nothing to do with Miss Salters' dues. If it's to be accepted you have to clear it with Mr. Kamenkowitz" (A. 6; 84). Bragg then left (A. 6; 84).

Before leaving to see Kamenkowitz, Salters received from the clerk an itemized bill indicating that she owed $125.00 in Union dues (A. 84). When she arrived at Kamenkowitz' office, his secretary informed Salters that he was at a meeting (A. 6; 84). When Salters informed the secretary that Kamenkowitz was expecting her, the secretary went into Kamenkowitz' office, and upon returning told Salters:

"Mr. Kamenkowitz is not going to see you at all today or any other day." (A. 6; 85). Salters then left the office (A. 6; 85).

II. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found that the Union violated Sections 8(b)(2) and 8(b)(1)(A) of the Act by causing the discharge of Verneal Salters for reasons other than her failure to pay her union dues. (A. 8-18, 23). The Board also found that the Union violated Section 8(b)(1)(A) of the Act by Bragg's threat to Salters during their May 23 conversation that she should "just pay your dues or I'll send a letter," since this threat was prompted not by Salters' failure to pay dues but her questioning of the retroactive wage payments (A. 17-18, 23).

The Board's order requires the Union to cease and desist from the unfair labor practices found and from causing Upper Manhattan Medical Group or any employer to discriminate against employees in violation of Section 8(a)(3) of the Act. (A. 19-20, 23). Affirmatively, the order requires the Union to notify the Upper Manhattan Medical Group in writing that it has no objection to Salters' employment and requests her reinstatement, make Salters whole for any loss sustained as a result of her discharge, and post the usual notices (A. 19-20, 23).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDINGS THAT THE UNION VIOLATED SECTIONS 8(b)(1)(A) AND (2) OF THE ACT BY THREATENING TO CAUSE, AND THEREAFTER CAUSING, THE DISCHARGE OF EMPLOYEE SALTERS UNDER A UNION SECURITY AGREEMENT FOR REASONS OTHER THAN HER FAILURE TO PAY DUES

There is no dispute that but for the Union's request employee Salters would not have been discharged by the employer on May 28 and that she was then delinquent in paying her dues. However, the issue here is whether the Union's request for her discharge was based solely on her dues delinquency. We show below that the Board properly concluded that the Union caused her discharge at least in part for reasons other than her failure to pay union dues, and thereby violated Sections 8(b)(1)(A) and (2) of the Act.

A. Applicable Principles

The policy of the Act "is to insulate employees' jobs from their organizational rights," but the Act contains a narrow exception providing that employees may be required to become and remain union members as a condition of employment. Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 40, 41-42 (1954). The union security exception is embodied in the provisos to Section 8(a)(3) of the Act.[5/]

5/ Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual (Continued)

Under the provisos, as the Supreme Court has held, Radio Officers, supra, 347 U.S. at 41-42:

> . . . an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.

In brief, the permissible union membership requirement "is whittled down to its financial core." N.L.R.B. v. General Motors Corp., 373 U.S. 734, 742 (1963). And it is clear that "Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." Radio Officers, supra, 347 U.S. at 41.

5/ (continued)

> aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(3), which makes it an unfair labor practice for an employer to discriminate against employees to encourage or discourage union membership, contains the following provisos (quoted in pertinent part):

> Provided, That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employmemt membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . . Provided further, That no employer shall justify any discrimination against an employee (Continued)

Consequently, a union may not cause an employee's discharge under a union security clause for reasons other than the employee's failure to tender his union dues. Of course, delinquency in satisfying even a valid dues obligation may be merely a pretext for what is in fact an unlawfully motivated discharge demand. In such a situation, if an improper motive can be demonstrated, the union will have violated Section

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5/ (Concluded)

> for nonmembership in a labor oraganization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employer to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(b) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents . . .
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .,
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. [Emphasis added.]

8(b)(1)(A) and 8(b)(2) even though motivated only in part in causing the employee's discharge by reasons other than failure to tender union dues. N.L.R.B. v. Biscuit & Cracker Workers' Union, Local No. 405, 222 F.2d 573, 577, (C.A. 2, 1955). Accord: N.L.R.B. v. International Longshoremen's and Warehousemen's Union, Local 17, 431 F.2d 872, 873 (C.A. 9, 1970), enforcing 172 NLRB 2016 (1968); Puerto Rico Drydock & Marine Terminals, Inc. v. N.L.R.B., 284 F.2d 212, 215 (C.A. D.C., 1960), cert. denied, 364 U.S. 883; N.L.R.B. v. Broderick Wood Products Co., 261 F.2d 548, 558 (C.A. 10, 1968); N.L.R.B. v. Technicolor Motion Picture Corp., 248 F.2d 348, 356 (C.A. 9, 1957); N.L.R.B. v. Mechanics Educational Society of America, 222 F.2d 429 (C.A. 6, 1955), enforcing 109 NLRB 838 (1954).

Accordingly, a union violates Sections 8(b)(1)(A) and 8(b)(2) if it causes an employer to discharge or otherwise discriminate against an employee in retaliation for his protesting the union's policies or questioning the official conduct of its agents. National Maritime Union of America, AFL-CIO v. N.L.R.B., 423 F.2d 625, 626 (C.A. 2, 1970), enforcing 177 NLRB 615 (1969); N.L.R.B. v. Hoisting and Portable Engineers, Local No. 4, 456 F.2d 242 (C.A. 1, 1972); Rust Engineering Co. v. N.L.R.B., 445 F.2d 172, 174 (C.A. 6, 1971); N.L.R.B. v. Chicago Roll Forming Corp., 418 F.2d 346, 347-349 (C.A. 7, 1969). Nor may a union discriminate against an employee for questioning the union's compliance with or enforcement of the collective bargaining agreement. Local Union No. 444, International

Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, 426 F.2d 229, 230 (C.A. 7, 1970), enforcing 174 NLRB 1108 (1969); N.L.R.B. v. International Longshoremen's & Warehousemen's Union, Local 12, 378 F.2d 125, 126-129 (C.A. 9, 1967), cert. denied, 389 U.S. 846; N.L.R.B. v. Local 65, United Brotherhood of Carpenters and Joiners of America, 318 F.2d 419 (C.A. 3, 1963), enforcing 135 NLRB 574, 575-577 (1962). Even where members engage in conduct which may reasonably be viewed as offensive to union officials, it is an impermissible infringement on the Act's "insulation" policy if the union applies disciplinary measures which adversely affect the offender's job rights. See e.g. N.L.R.B. v. United Marine Division, Local 333, National Maritime Union, AFL-CIO, 417 F.2d 865, 867-868 (C.A. 2, 1969), cert. denied, 397 U.S. 1008 (discrimination because employee refused to retract derogatory remarks about the union's president); N.L.R.B. v. International Longshoremen's & Warehousemen's Union & Local 27, 514 F.2d 481, 483 (C.A. 9, 1975) (discrimination because of personal hostility of a union committee member towards an employee); N.L.R.B. v. Hod Carriers' and Construction Laborers' Union, Local No. 300, AFL-CIO, 392 F.2d 581, 582 (C.A. 9, 1968) (discrimination because employee had been disrespectful to union business agent); Lummus Company v. N.L.R.B., 339 F.2d 728 (C.A. D.C., 1964) (discrimination because of employee's abusive conduct towards a member of the union's executive board). Further, as the Third Circuit held in N.L.R.B. v. Local 169, International Brotherhood of Teamsters, 288 F.2d 425, 429, n. 7 (1955): "So far as §8(b)(2) is concerned, the real reason

for discharge is immaterial so long as it was not for failure to pay the uniformly required periodic dues."

B. The Union caused Salters' discharge for reasons other than her failure to pay Union dues

The sequence of events culminating in the Union's demand for Salters' discharge clearly supports the Board's finding that the motivating force behind the Union's demand was not Salters' dues delinquency but her complaints on Friday, May 23, to the employer and the Union about the retroactive wage payments. Indeed, these complaints of Salters were the only change in her relations with the Union after May 5, when she had promised Union Vice President Bragg that she would pay her back dues on May 30.

While it is true that, during the contracts negotiations prior to May 5, Bragg urged Salters to pay on her back dues and even threatened to seek her discharge if she did not, he took no further action at that time. And on May 5, at the contract ratification meeting, Salters agreed to pay her dues in full before noon on Friday, May 30, even though Bragg admittedly requested only that she make an "arrangement" for partial payments. 6/ Nor does the Union claim to have made any further request to her

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6/ Bragg testified (A. 173) that he told Salters and the other dues delinquent members that ". . . what I wanted [them] to do was just to make arrangements because I could not make arrangements for them . . . I know that they couldn't pay it all at one shot but to make arrangements to pay, whether it was $5 a week or $10 a week, whatever it was, just make arrangements."

until her May 23 telephone conversation with Bragg regarding her complaints about the handling of the retroactive wage payments under the new collective bargaining agreement.[7/] Then Bragg interjected (A. 184), "I want you to get down here and make arrangements to pay your dues." Salters again reminded him that she had promised to pay her back dues in full on May 30. Nevertheless, that very day, Bragg filled out the Union's termination of employment forms on Salters, without even waiting for Salters to satisfy her dues arrearage on May 30.[8/] The result was her discharge on May 28. Plainly, this is strong circumstantial evidence that the request for her discharge was motivated by Bragg's anger at her complaints and the adverse comments about Salters made to him by Administrator King and the Union delegates, also directed at her same complaints regarding the administration of this part of the contract.

Further evidence that the Union's request for Salters' discharge was motivated by reasons other than her dues delinquency appeared in the testimony of Vice President Bragg about his concern as to Salters' conduct toward fellow Union members in making her

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7/ The Board inferred that Bragg initiated the procedure which resulted in the discharge procedure against Salters on Friday, May 23, because the Union mailed the letter requesting her discharge on Tuesday, May 27, and Monday, May 26, was Memorial Day (A. 12; 79).

8/ Although Bragg testified that on May 5 he told Salters that ". . . when you get your retro money, make a payment, give them $5, $10" (A. 194) and the employees received the first installment of these payments on May 16, there is no credible evidence that the Union took any action regarding Salters at that time, as we show below.

retroactive pay complaints. Thus Bragg testified (A. 191) that the "employer probably didn't want to take her back . . . [b]ecause Salters unfortunately is. . . at times uncouth, very crude, very unprofessional, and her coworkers don't particularly care for her, some of her coworkers." Asked to explain this, Bragg declared ". . . my members were very indignant. . . . . very indignant and upset about the way she carried on about [other] members." 9/ In particular, he cited "Zenia Walker, her coworker. . . who made the mistake . . . in paying the retroactive money" (A. 191-192). In essence, this testimony amounts to a virtual admission that the Union's successful request for Salters' discharge was motivated in substantial part by Salters' complaint involving a fellow union members' mistake. Such a motive is plainly unlawful. See cases cited above at pp. 12-13.

Additional evidence that the Union caused Salters' discharge for reasons other than the non-payment of dues is found in the Union's disparity in its treatment of her compared with other delinquent members. Particularly notable is the case of Delores Williams, who was 24 months in arrears on May 28 compared with Salters' 13. Nevertheless, although Williams made no "arrangement" about her dues, the Union took no action

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9/ In obvious error, the transcript reads: "her members" (A. 192).

against her and she remained on the job until she quit June 10 (A. 14; 41, 147a-149, 188-190).[10/] International Assn. of Machinists and Lodge 1021 v. N.L.R.B., 247 F.2d 414, 421 (C.A. 2, 1957)("this court has given great weight to evidence of any disparity in a union's treatment of different employees, all of whom were similarly delinquent in tendering back dues"); N.L.R.B. v. Biscuit and Cracker Workers Local Union 405, supra, 222 F.2d at 575-577; N.L.R.B. v. Local 169, International Brotherhood of Teamsters, supra, 228 F.2d at 429-430 and n. 9.[11/]

10/ The Union's explanation for the leniency toward Williams was that she had said, in April or May, that she was going to quit (A. 189). However, that would seem to be all the more reason to seek to collect her back dues. Moreover, Bragg testified that, although he was "supposed to send out a letter on her" and Executive Vice President Kamenkowitz told him to "get rid of her" (A. 189), he took no action. He showed no such reluctance to act in the case of Salters after her wage complaints although he claimed her as a friend, who he treated "like a sister" (A. 192, 183-184) and a fellow member of the Union negotiating committee.

11/ Before the Board, the Union argued that it was being penalized for maintaining a flexible dues delinquency policy. However, as this Court noted in Cunningham v. Erie Railroad Company, 358 F.2d 640, 644-645 (C.A. 2, 1966) (finding similar unlawful discrimination under the Railway Labor Act):

> Nor is there any issue here on the subject of the right of the Union, absent "hostile discrimination," to apply its dues delinquency policies in a flexible and commonsense way, taking occasional hardships or even mere laziness or inattention into consideration . . . . We perceive no danger . . . of deterring unions from pursuing liberal dues delinquency policies, so long as such unions refrain, as they are required by law to refrain, from "hostile discrimination" and bad faith against individual members of their organizations.

Also on May 28, seven other employees, besides Williams and Salters, out of a unit of 35 were more than 3 months delinquent in their dues (A. 14; 36-39, 42-45, 46-55, 146-152). Among them were: Zenia Walker, 9 months; Mary Layton, 5 months; and Janice Johnson, 7 months. Walker made no arrangement to pay her dues until she actually made a payment of $76 on May 30 (A. 15; 36-37). Johnson made no arrangment until May 29 (A. 15; 59, 153-155, 173-174).[12/] Layton did not make a payment until June 3 (A. 52).

To explain why the Union caused Salters' discharge yet took no action against other delinquents, Bragg testified that this was because of a "rule of thumb" which had been promulgated by Executive Vice President Kamenkowitz that discharge should be sought for members more than one year delinquent. However, although the record shows that employee Laura Gomez was one year behind in her dues as of April 24, 1974, the Union did not request her discharge (A. 14; 40-41, 54-55, 152). Nor was the claimed one-year rule applied to Delores Williams, supra, who on May 28 -- the date of Salters' discharge -- was two years behind (A. 14; 41, 147a-149).

Even aside from the Union's behavior prior to Salter's discharge, its actions thereafter also demonstrated that the Union treated Salters with uncharacteristic hostility. Bragg testified that he had placed a note on Salters' Union dues ledger card that no dues were to be accepted from Salters unless Executive Vice President Kamenkowitz approved.

12/ Johnson's dues ledger card showed that she did not make an actual payment until June 12 and no further payment until October 24 (A. 46-47).

Since appending such a note was a routine procedure even after a request for discharge had been made, it is apparent that withdrawal of the discharge request by the Union upon payment of the dues arrearage was at least a possibility. Yet when Salters attempted to pay her dues delinquency on May 30, Kamenkowitz refused even to see her (A. 6; 84-85). 13/

Before the Board, the Union argued that the Union's request for Salters' discharge did not result from the May 23 conversation between Bragg and Salters because that decision had previously been reached at a Union staff meeting earlier that day by Executive Vice-President Kamenkowitz after reviewing the May dues delinquency list. (A. 7, 9, 177-180) 14/ The Board found, however, that the dues delinquency

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13/ Kamenkowitz did not testify at the hearing. Bragg explained that the Union refused to accept Salters' dues and even to see her because "[s]he couldn't go back, management didn't have to take her back" (A. 201). When the Administrative Law Judge became puzzled at that response, Bragg explained: "I think it would have been immoral and unethical on [our] part to take dues from someone if we weren't able to get her job back. . . . I guess it was [sic] Kamenkowitz also, I can't speak for him, I don't know why he instructed me to do that, but that is what he instructed me to do" (A. 202). Obviously, Bragg's explanation might have merit had the Union at least inquired whether the employer would have reinstated her. However, Kamenkowitz refused even to speak to Salters.

14/ As Bragg testified (A. 178):

> On the 23rd we reviewed the list.
>
> There were a number of people on that list in my area who had not paid dues since 1974.
>
> I was mandated by my boss at that point to remove those people from the job, to take them off the job. . . .

list for May could not have been prepared prior to the May 23 staff meeting (A. 9-12). Mary Austin, the supervisor of the Union's Finance Department, originally testified that the monthly delinquency list is prepared after the "final notices" are sent to those members who, as of the current month, have become in arrears for 3 months of dues (A. 10; 122-123, 145). The delinquency list for May, in pertinent part, is as follows (A. 42-45):

Drug Division Delinquency List

AREA HLA MONTH May

DATE NOTICE SENT May 27, 1975 DEADLINE June 6, 1975

The following delinquent members marked* received statements and owe a balance on an initiation fee. All others were sent Final Notices. The date indicated is for those sent prior to this month.

Thus, the form indicates that the names of those being listed as delinquent for the first time had already received their notices prior to the publication of the delinquency list itself. And the entry for the "Date Notice Sent" is "May 27, 1975". The next sentence on the form states that all delinquent members "were sent" final notices. Accordingly, the language of the delinquency form itself and Austin's testimony

clearly indicates that the delinquency list for May was not compiled until after the final notices for the newly delinquent members had been sent out on May 27. 15/

For these reasons, the Board concluded that the Union sought the discharge of Salters on May 27 because she raised questions about the administration of the bargaining agreement which irritated Bragg Administrator King, the Union delegates, and Zenia Walker, the Union member responsible for the failure to make the appropriate payments under the contract. Consequently, Bragg's threat to Salters on May 23 - "listen, just pay your dues or I'll send a letter" - constituted an independent violation of Section 8(b)(1(A)

15/ At first Bragg testified that he was not sure that during the May 23 staff meeting, the dues delinquent members were even discussed (A. 177). Later, Bragg could not explain how the dues delinquency list could have been discussed at the May 23 meeting when on its face it had to have been prepared no earlier than May 27 (A. 195). Austin then testified that even though the form states "Date Notice Sent," it really means the date the notice "will be sent." (A. 208). Not only would this testimony distort the language used on the form and directly contradict her testimony that the delinquency list was prepared after the "final notices" were sent out, but also record evidence specifically contradicts her testimony. Thus Zenia Walker, the first person named on the list, has an aseterisk by her name. Austin explained that this meant that Walker made a partial payment on a new initiation fee (A. 159). Walker's Union dues ledger card indicates that this payment was made on May 30 (A. 36-37). Of course, Austin's testimony would then indicate that the dues delinquency list was actually prepared no earlier than May 30. Austin then contradicted this testimony by stating that the asterisk must mean that Walker made an "arrangement" to pay her dues (A. 208). However, unlike evidence of "arrangements" made by others, the Union could not verify that an "arrangement" was made by Walker. Accordingly, the Administrative Law Judge discredited that part of Austin's testimony indicating that the dues delinquency list was prepared prior to May 27. (A. 11).

of the Act because of its context and motivation. On the facts shown above, the Board properly concluded that it was the Union's displeasure with Salters' question about the contract and not solely her failure to pay her dues that triggered the threat of discharge and her subsequent discharge. See Radio Officers' Union v. N.L.R.B., supra, 347 U.S. at 41; N.L.R.B. v. Biscuit and Cracker Workers Local Union No. 405, AFL, supra, 222 F.2d at 577

CONCLUSION

For the reasons stated above, it is respectfully submitted that a judgment should issue enforcing the Board's order against the Union in full.

JAY E. SHANKLIN,
ANDREW F. TRANOVICH,
Attorneys,

National Labor Relations Board,
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

March, 1977.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 76-4280
	)	
DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, A DIVISION OF RWDSU, AFL-CIO,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

Sipser, Weinstock, Harper,
& Dorn, & Leibowitz
Att: Jerome Tauber, Esq.
380 Madison Ave.
New York, New York 10017

Verneal Salters
1955 Second Avenue
New York, New York 10029

Elliott Moore

Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 23rd day of March, 1977.